Supreme Court, U.S.
FILED

(1)

No. 93200 MAY 19 199

IN THE SUPREME COURT OF THE UNITED STATES

OFFICE OF THE CLERK

OCTOBER TERM, 1993

IRVING M. PATZ

and

ANDREW D. PATZ,

Petitioners,

V.

HOLLIDAYSBURG TRUST CO.,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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Pro se

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50 pp
$ f/u

QUESTIONS PRESENTED

STATE ACTION

1. **RE: A 42 U.S.C. § 1983**, Action, when a private actor (Hollidaysburg Trust Co.) provides information and records to state actors (Hollidaysburg Police Department) pursuant to a search warrant; does that action constitute "State Action" for the purposes of A 42 U.S.C. § 1983 law suit in federal court?

CONSTITUTIONAL CLAIM

2. When a private actor fails to provide a receipt to the records provided to the State Authorities, in violation of state laws to the rights of the receipt (Pennsylvania Rules of Criminal Procedure Rule 2008). And where the official record of the warrant, affidavit, and inventory was not made available to the persons from

whom the property and records belonged, does that state a claim under the United States Constitution for the rights to the information given to the state actors by the person, acting as custodial agent of the records?

STANDARD OF PLEADING

3. Where the United States District Court for the Western District of Pennsylvania (herein called the District Court) and the United States Third Circuit Court of Appeals (herein Called the Third Circuit Court) holds the petitioner to a higher standard of pleading than that which the United States Supreme Court recognizes as sufficient, for a pro-se incarcerated person, should that person's complaint survive a motion for dismissal pursuant to F.R.C.P. 12(b)(6)?

LIST OF PARTIES AND RULE 29.1 LIST

The caption on this petition identifies all parties in the Court of Appeals. Petitioner Irving Patz is not a corporation.

No additional parties are involved or were involved in the District Court.

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NO. _____

IN THE SUPREME COURT OF THE
UNITED STATES OF AMERICA

OCTOBER TERM, 1993

IRVING AND ANDREW PATZ,
Petitioners,

v.

HOLLIDAYSBURG TRUST CO.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners Irving and Andrew Patz, respectfully pray that a writ of certiorari issue to review the judgement without opinion of the United States Court of Appeals for the Third Circuit affirming the dismissal with prejudice of the United States District Court Western District of Pennsylvania. The case was a civil rights lawsuit under a 42§1983 action by a plain-

tiff incarcerated in a state institution and a plaintiff on probation. The cause of action was a due process violation when the Hollidaysburg Bank refused to give a copy of a receipt to a search warrant to the Petitioners in this action or to the attorney of record at the time. Upon investigation it was learned that the information was given out before the warrant and that the warrant, affidavit, and inventory cannot be found in the Office of the Magistrate that signed it, or in the Prothonotaries Office in the Courthouse, where it was used as an official document to allow evidence to be presented at a criminal trial.

OPINIONS BELOW

The United States Court of Appeals affirmed the judgment of the United States District Court, Western District without

opinion and it appears in Appendix (A) to this petition. The unpublished written opinion of the Western District of Pennsylvania District Court appears in Appendix (B) to this petition.

JURISDICTION

The Court of Appeals decision in this matter was filed on Jan. 25, 1994 see App. (A): A subsequent motion for mandatory injunction to require the respondent to produce the receipt/inventory to the search warrant was denied without prejudice by the United States Court of Appeals and filed on Jan. 25, 1994. As set forth in Appendix (C): A timely petition for rehearing was filed on February 17, 1994 the Court of Appeals denied the Motion as set forth in Appendix (D) on the 28th of February 1994. This Court's jurisdiction

is invoked under Title 28, U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendments IV, V, IX, XIV to the United States Constitution as set forth in Appendix (E). Title 42 § 1983 Appendix (E) Rule 2008. PA. Rules of Criminal Procedure; Receipt for Seized Property

> (a) A Law Enforcement Officer, upon taking property pursuant to a search warrant, shall leave with the person from whom or from whose premises the property was taken a copy of the warrant and affidavit(s) in support thereof, and a receipt for the property seized. A copy of the warrant and affidavit(s) must be left whether or not any property is seized.

STATEMENT OF THE CASE

Following their conviction in a Blair County Common Pleas Court the Petitioner Irving and Andrew Patz filed a 42 § 1983 lawsuit against the respondent, Hollidaysburg Trust Co. of Hollidaysburg Pennsylvania, alleging a due process violation in failing to provide information to the Petitioners on what had been removed, for evidence, from the Bank pursuant to a search warrant. The case went to the United States District Court in Western Pennsylvania, Johnstown, April of 1993. On July 15, 1993 the Bank filed a motion to dismiss pursuant to F.R.C.P. 12(b)(6) and 12(B)(1). The Bank based their motions on a failure to allege the action under "Color of the Law" and on a failure to state a claim for which relief could be granted. Immediately thereafter the Peti-

tioners filed an amended complaint to replace the original complaint and corrected the defects. On August 13, 1993 the Western District Court dismissed the claim as frivolous and granted the motion by the Bank for failure to state a claim. The Court dismissed the action with prejudice. Following the denial of a certificate of probable cause the Petitioners filed a timely appeal to the United States Court of Appeals for the Third District. On September 13, 1993 the case was docketed. Notice was sent out to all parties for briefing schedules.

Petitioner's informal brief set forth three issues for review to the Court of Appeals. The argument was based on the jurisdictional question and the use of a search warrant that had been altered to remove the inventory control number. The

question of not providing the petitioner an opportunity to present the case with discovery was also raised. The bank responded with a brief that centered on the fact that bank records were not a constitutional issue. The petitioner responded with a reply brief that outlined the Pennsylvania law on "bank privacy rights", and the rules for failing to comply with state laws on inventory procedures. The reply also outlined the facts that the violations were not disputed and the fact that the search warrant was a fraud. A number of documents were presented as prima facia evidence. The bank did not respond to the reply brief. A mandatory injunction motion was filed for relief to have the receipt from the search warrant as required by law. The bank responded by a reply that the right to the information is

"not constitutionally protected."

The United States Third Circuit Court of Appeals having jurisdiction to an "appeal as of right" F.R.C.P. through Rule 3 of appellate procedures found the action by the district court on the issue to be affirmed. Costs were taxed against the petitioner. No opinion was cited. The petitioner moved for reconsideration which the court classified as a rehearing. The motion was denied. The motion for mandatory injunction was denied without prejudice to the right to move for the inventory before the criminal court. The issue of the search warrant was never addressed by the court.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for three reasons: This petition presents an

issue in direct conflict with the United States Supreme Court in Haines v. Kerner 92 S.Ct 594 (1972). Where before dismissal a pro-se inmate is afforded the opportunity to correct defects, offer proof, and where the complaint is granted less stringent standards than those drafted by attorneys. The opinion by the District Court and affirmed by the Third Circuit Court of Appeals on the theory the bank being an instrument of the state and "clothed with the authority of state law", citing Lugar v. Edmondson Oil Co., 457 U.S. 922, 929 (1982) **conflicts** with the conspiracy facts presented in the complaint and with the Supreme Court and Third Circuit Court on their decisions in Adickes v. Kress & Co., 398 U.S. 144 (1970) & Jennings v. Shuman, 567 F2d 1213, 1220 (3d Cir 1977) respectively. And finally a

United States District Court that called a constitutional issue involving a search warrant without a receipt, inventory or record of its existence as "frivolous"; violates the spirit of the United States Constitution.

Petitioner Andrew Patz is on probation and is working in Houston, Texas to help finance this lawsuit. All filing fees have been paid and at no time has the petitioner requested the government to pay any expenses. Petitioner Irving Patz is incarcerated in a Pennsylvania correctional institute and has done all the legal research and has filed the complaint and the appeals. Irving Patz has a college education and had some exposure in Admiralty Law. However, up and until the day of arrest, criminal and civil law was never studied. (All references to petitioner

refer to Irving Patz) The petitioner used his knowledge of the "law of the sea" to make an attempt to find out why certain unexplained incidents were happening. A private attorney, a private investigator, and the petitioner attempted to get information from the Hollidaysburg Bank on information they provided to the police. The bank refused to give up the information but did present a search warrant. However, the warrant had no inventory, affidavit or receipt.

An attempt to have the evidence suppressed failed, and the items given to the police by the bank were admitted in court. The petitioners were found not guilty of all charges related to the bank records that were obtained by the police, except for one charge related to two checks, against Irving Patz, however, petitioners

were found guilty of unrelated charges. After incarceration petitioner attempted to gain more information on the search warrant, with some assistance from a friend with the F.B.I. in Houston, and with some help from a private detective, the petitioner had evidence that the bank released the records before the search warrant was issued, that no record of the warrant exists, and that the company that filed the charges related to the checks had filed an insurance claim for the total value of all the canceled money orders recovered from the bank.

The petitioner filed this lawsuit. The petitioner filed a complaint with the Attorney General's office, against the magistrate that issued the warrant. The petitioner contacted the F.B.I. The attorney of record Tom Dickey failed to

properly brief the issue and thus waived the right to appeal. Since the decision, the attorney will not answer phone calls or letters, he has been fired. The F.B.I. wants no part of the case, and the Attorney General Investigator, Greg Kerpchar, refuses to disclose the results of his investigation.

The Complaint was dismissed with prejudice five days after the amended complaint was filed. The issue of the warrant was never addressed. An appeal followed, the issue was extensively briefed by both the bank and the petitioner, but the Third Circuit affirmed the Lower Court without opinion, and the issue of the warrant was never addressed.

Now the petitioner comes before the Supreme Court of the United States and states that the search warrant was used

for the purpose of protecting the Bank from state sanctions, and for allowing the evidence to be used in court because the Pennsylvania Constitution prohibits bank records to be used in a criminal proceeding without a search warrant or Court Order. Documents were provided to the Lower and Circuit Courts as prima facia evidence of the truth to the matters asserted.

The petitioner has spent two years researching the law and attempting to get into the Court on the issue. But the bank had blocked the entrance and attempted to divert the issue. In other words, an old-fashion coverup. This is not supposed to happen, but it did, and is still causing harm to the petitioners because the information would be prima facia evidence of the truth to the Constitutional violation.

In order to prove to this Court that the petitioner has not made up this story, three documents will be presented for the Court to review: **Exhibit (F)**; a copy of search warrant A26127, **Exhibit (G)**; a copy of Attorney Tom Dickey's attempt to gain access to the official search warrant records, and **Exhibit (H)**; a copy of the motion by the bank to deny reconsideration of the appeal. The final exhibit is to confirm the fact that a controversy existed and a judgment by law should have been rendered from the Court of Appeals.

This Court must grant Certiorari because when a major New York stock exchange bank (Penn Central BankCorp, parent co.) does not have to address a clear cut violation of the law and a violation of a known Constitutional right, then a very dangerous precedent will have been set.

Based upon the opinion from the U.S. District Court, it would appear that the petitioner failed to raise the issue. However, the Amended Complaint presented the issue of the search warrant several times and outlined the conspiracy theory specifically on page A9 of Count II stating, "The Bank collaborated with Officer Thomas O'Leary of the Hollidaysburg Police to not provide a receipt for copies of money orders handed over to police because the search warrant A26127, dated October 17, 1991 had been altered to block the inventory control number." Proof is the copy of the warrant given to the petitioner by the bank, and presented in this petition for examination. Black's Dictionary describes a search warrant as:

> **An order in writing, issued by a Justice or other Magistrate, in the name of the state, directed to a law enforcement officer**

> **authorizing him to search for and seize any property that constitutes evidence of the commission of a crime, contraband, the fruits of crime, or things otherwise criminally possessed;**

The warrant being an instrument of the state then Black's Dictionary now defines "State Action" as:

> **In general, term used in connection with claims under Due Process clause and Civil Rights Act for which a private citizen is seeking damages or redress because of improper governmental intrusion into his life.**

There never was a dispute of the existence of the warrant and of the police involvement. The District Court never stated the warrant as part of the bank's involvement. The Court noted on page 2 of its opinion, "There are no allegations that would allow an inference that Hollidaysburg Trust Co. became an instrumentality of the state," or became, "clothed with the authority of state law,"

citing Lugar v. Edmondson Oil Co. The petitioner took the bait and attempted to argue the Court's position to the Third Circuit.

The United States Supreme Court in Haines v. Kerner, 92 S.Ct. 594 (1972) so notes, **"Allegations of pro se complaints are held to less stringent standards than formal pleadings drafted by lawyers."** The Court expected the petitioner to have understood the legal argument. After the appeal to the Third Circuit, the petitioner discovered that the legal issue was not Edmondson because the Bank was never clothed with state authority. The legal issue was the conspiracy theory associated with the warrant and with the police involvement. Thus the issue involved the Supreme Court rule in Adickes v. S.H. Kress & Co., 398 U.S. 144,90 S.Ct. 1598 (1970):

Private persons jointly engaged with state officials in a prohibited action act under color of law for purposes of the statute. To act under color of law, said the Court, does not require that the accused be an Officer of the State, but rather it is enough that he is a willful participant in joint activity with the state or its agents.

There is no question that this was the proper case and the proper law. The Bank acted jointly with the authorities to provide a search warrant after the documents had already been seized. The proof was Exhibit (A) on the Complaint, a police report showing the checks had been obtained one month before the warrant was issued. The Third Circuit never addressed the issue of "state action." And so, the District Court opinion stands as read. In any case the Courts always allowed an issue to at least have an opportunity for discovery. In this case, the Court never

offered that opportunity to be able to develop the conspiracy through discovery. The Bank managed to change the case from Patz v. Hollidaysburg Bank to Patz v. The U.S. District Court on the legal issue.

The other major legal issue was raised by the petitioner in the Amended Complaint when Count II, III, and IV each referred to the Bank not providing a receipt/inventory to what had been removed with the search warrant. The petitioner based the argument on Rule 2008 PA.R. Cr.P. where a receipt to a search warrant is required under Pennsylvania law.

The Bank came back with their legal argument in their brief to the Third Circuit on this issue: Here the Bank so notes Page 13, No. II, "The Patz Complaint cannot state a claim under §1983 because the alleged conduct of the Bank did not

deprive Patz of any Constitutionally protected right, as there is no Constitutional protection for Bank records." The Bank based their argument on U.S. v. Miller, 425 U.S. 435 (1975), a Supreme Court case that addressed the issue of a Constitutional right to privacy in bank records. The Court stated:

> **Checks are not confidential communications but negotiable instruments to be used in commercial transactions. The depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the government. 425 U.S. at 442.**

Based on Miller, the Bank noted that the District Court's dismissal of the lawsuit was proper. The petitioner had raised the argument that under Commonwealth v. DeJohn, 403 A2d 1283 (Pa. 1979):

> **Bank records obtained by the police without a valid search warrant or Court Order are inadmissable in a criminal action**

and must be suppressed.

Based on this argument, the right to the receipt would have been the written and signed confirmation of what was removed with the warrant. Without the receipt there was no written inventory of what had been removed, and that stated the petitioner violated his Constitutional right to Due Process. It also was an unconstitutional search and seizure and a state tort claim for breach of confidentiality.

The District Court and the Third Circuit never addressed the controversy. As noted in Exhibit (H) of the appendix, item no. 6, "The issues which appellants list in support of this request constitute matters briefed extensively both on appeal to this Court as well as in the District Court, including, "Violations of state laws, rights to privacy in bank records

and state action." Once again, based upon **The Supreme Court in Haines**, the Courts held this petitioner to a standard above that for a pro se plaintiff in filing a civil lawsuit.

And finally the Third Circuit Court denied the mandatory injunction for the Bank to produce the inventory, without prejudice, to the right to move before the criminal court in which the search was conducted to request that the inventory of the search be furnished, but denied with prejudice the right for redress if indeed the petitioner's claim that the inventory does not exist is proven to be correct, and thus far, no inventory has ever been made available or even admitted to exist.

SUMMARY

This case represents a 42 U.S.C.

§1983 lawsuit for redress against a bank that gave out information to the police without a valid search warrant; the Pennsylvania Constitution provides for the right to privacy in bank records and government intrusion on that right is unacceptable and violates state's rights.

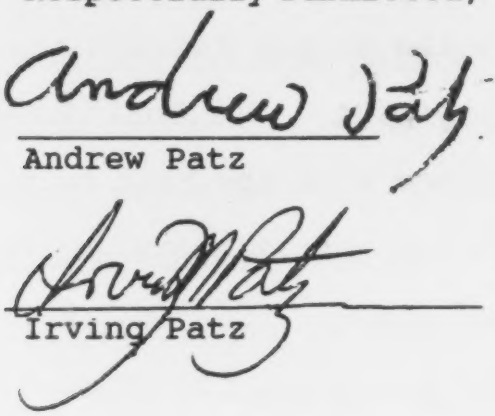
The Federal Courts do not have to uphold those rights, but could do so when the lines are crossed and the ambit of the zone of Constitutional rights are inflicted to cause a major breakdown in the Judicial system, the results of which violated the rights to the Fourth Amendment to the United States Constitution, in the fact that a warrant without a receipt is unreasonable. The Fifth Amendment right to Due Process by having the information of the records available upon request. The Ninth Amendment in the right to privacy, and in

the information on the checks as applied to the states through the Fourteenth Amendment. The Hollidaysburg Police conspired with the Bank to violate the rights of the petitioners in obtaining records and then
not providing the receipt to the petitioners in violation of state law.

CONCLUSION

For the reasons set forth in this petition, a Writ of Certiorari should be issued to review the case and to order accordingly. If the Court elects not to address the issue presented, then to remand this Writ to the Third Circuit Court of Appeals in light of this Court's opinion in Haines and/or Adickes supra.

Respectfully Submitted,



Andrew Patz

Irving Patz

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-3443

IRVING MARVIN PATZ;
ANDREW DOUGLAS PATZ,

Appellants

v.

HOLIDAYSBURG TRUST CO.

On Appeal from the United States
District Court for the Western District
of Pennsylvania
(D.C. Civ. No. 93-cv-00140J)
District Judge: Hon. D. Brooks Smith

Submitted Pursuant to Third Circuit
LAR 34.1(a)
January 5, 1994

Before: SLOVITER, Chief Judge
COWEN and LEWIS, Circuit Judges

JUDGMENT ORDER

After consideration of all contentions raised by appellant, it is

ADJUDGED and ORDERED that the judg-

ment of the district court entered August 12, 1993 be and is hereby affirmed. Costs taxed against appellants.

By the Court,

_____
Chief Judge

Attest:

_____
P. Douglas Sisk, Clerk

Dated: January 25, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

IRVING PATZ, Plaintiff	:	
v.	:	Civil Action
HOLLIDAYSBURG TRUST CO.,	:	No. 93-140J
Defendant	:	

MEMORANDUM ORDER

SMITH, District J.

Plaintiff Irving Patz[1] is incarcerated pursuant to a 46-110 month sentence

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1. The complaint states that plaintiffs are Irving Patz and Andrew D. Patz, father and son. All of the averments of the complaint, however, deal with allegations by Irving Patz (see e.g. Attachment to Complaint at 5: "I made arrangements ... I also decided ... My son Andrew and I ..., etc.") that his civil rights were violated. Further, in the Motion to Amend the complaint, Irving Patz refers to himself as pro se plaintiff and as pro se counsel for Andrew Patz. Andrew Patz was not convicted of any crime and is allegedly currently residing in Texas. Therefore, in this memorandum, where plaintiff is referred to in the singular, Irving Patz is intended.

imposed by the Court of Common Pleas of Blair County, apparently after a conviction of theft related to the purchase of money orders from defendant Hollidaysburg Trust Co. Plaintiff has filed a suit alleging that Hollidaysburg Trust Co. has generally violated his right to privacy, right to due process and right to a fair trial. Specifically, at page 6 of his Attachment to his complaint, Patz alleges that Hollidaysburg Trust Co. violated its contractual duty of confidentiality to Patz, and that an employee of Hollidaysburg Trust Co. committed perjury at a suppression hearing.

Plaintiff does not allege that defendant acted under color of state law, nor does a private actor act under color of state law by being a witness in a criminal matter, or by giving evidence in any

evidentiary proceeding. Briscoe v. LaHue, 460 U.S. 325, 329-30 (1983).

Defendant has moved to dismiss plaintiff's complaint on this basis. Docket no. 3, 4. In response, plaintiff has filed a motion to amend the complaint and to deny the motion to dismiss, docket no. 6, which alters page 5 of the Attachment to the complaint to allege that an employee of Hollidaysburg Trust Co. presented evidence to the Hollidaysburg Borough Police Department instead of to a private employer, and that certain events took place in September, 1991 instead of September, 1990. Plaintiff adds additional allegations detailing the course of the criminal investigation and prosecution against him, and alleges that Hollidaysburg Trust Co. acted under color of state law by collaborating with the

Hollidaysburg Borough Police Department in providing that police department with records.

Plaintiff's complaint, even as amended, fails to allege facts that would allow an inference that Hollidaysburg Trust Co. acted under color of state law. Even if the conclusory allegations that the defendant violated state and federal banking laws providing for the confidentiality of banking records are accepted, this Court does not have jurisdiction pursuant to 28 U.S.C. Section 1343 (a)(3) over plaintiff's Section 1983 claim. There are no allegations that would allow an inference that Hollidaysburg Trust Co. became an instrumentality of the state or became "clothed with the authority of state law," Lugar v. Edmondson Oil Co., 457 U.S. 922, 929 (1982) (quoting United States v.

Classic, 313 U.S. 299, 326 (1941).

Plaintiff's complaint, even as it would be amended, lacks any arguable basis in law, and would be dismissed as frivolous pursuant to 28 U.S.C. § 1915(d) were plaintiff proceeding in forma pauperis. Defendant's motion to dismiss pursuant to Rule 12(b)(6) is granted. The complaint is dismissed with prejudice, and the Clerk shall mark this matter closed.

BY THE COURT,

DATE: August 10, 1993

D. Brooks Smith
United States
District Judge

cc: Irving Patz - BY-6025
801 Butler Pike
Mercer, PA 16137

Daniel P. McDyer, Esq.
Paul G. Mayer, Jr., Esq.
2200 Gulf Tower
Pittsburgh, PA 15219

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
January 3, 1994

No. 93-3443

Irving Marvin Patz;
Andrew Douglas Patz,
Appellants,

v.

Hollidaysburg Trust Co.
(WDPA (Johnston) DC Civil 93-cv-00140J)

Present: SLOVITER, Chief Judge,
COWEN and LEWIS, Circuit Judges

Motion by Appellant pro se Andrew Patz for Mandatory Injunction requiring the appellee to produce the inventory of items taken pursuant to warrant A26127.

Angela Perricone, Deputy Clerk
597-3080

Appeal is listed on the merits on 1-5-94

ORDER

The foregoing Motion by appellant for Mandatory Injunction requiring the appellee to produce the inventory of items taken pursuant to warrant A26127 is denied without prejudice to the right of the appellant to move before the criminal court in which the search was conducted to request that an inventory of the search be furnished.

By the Court,

Chief Judge

Dated: Jan. 25, 1994

8C

February 17, 1994

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-3443

PATZ; et al. v. HOLLIDAYSBURG TRUST CO.

Present: SLOVITER, Chief Circuit Judge
COWEN and LEWIS, Circuit Judges

1. Motion by pro-se appellants, requesting Clarification of Judgment Order.

2. Response by Appellee is also enclosed.

Kathleen O'Toole
Deputy Clerk
Direct Dial: 597-5846

ORDER

Treating the motion by appellants for clarification of judgment order as a petition for panel rehearing as well as motion to clarify judgment order, the motion is hereby denied.

By the Court,

Chief Judge

Dated: Feb. 28, 1994

FOURTH AMENDMENT

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the places to be searched, and the persons or things to be seized."

FIFTH AMENDMENT

"No person shall be deprived of life, liberty, or property, without Due Process of law."

NINTH AMENDMENT

"The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

FOURTEENTH AMENDMENT

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any persons of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 § 1983

"Every person who, under color of any statute, ordinance, regulation, custom, or usage of any state, territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United

States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action of law, suit in equity, or other proper proceeding for redress."

Commonwealth of Pennsylvania — SS: COUNTY OF Blair

SEARCH WARRANT AND AFFIDAVIT

WARRANT CONTROL NO. A-26127

DATE OF APPLICATION 10-17-91

Officer Thomas D. O'Leary Hollidaysburg Borough Police Dept.

(Name of Affiant) (Police Department or address of private Affiant) (Phone No.)

being duly sworn (or affirmed) before me according to law, deposes and says that there is probable cause to believe that certain property is evidence of or is the fruit of a crime or is contraband or is unlawfully possessed or is otherwise subject to seizure, and is located at particular premises or in the possession of the particular person as described below.

SPECIFIC ITEMS TO BE SEARCHED FOR AND SEIZED (Be as specific as possible in describing the items to be searched for and seized):

Money Orders issued by Hollidaysburg Trust Co. Hollidaysburg, Pa. to either Irving PATZ or Andrew PATZ during the time period of 8-15-90 to 8-25-91 and all records attached to the Money Orders. Money Orders are Personal Money Orders issued by Hollidaysburg Trust Co.

SPECIFIC DESCRIPTION OF PREMISES AND/OR PERSONS TO BE SEARCHED (Street and No., Apt. No., Vehicle, Safe Deposit Box, etc.):

Building located at 224 Allegheny St. Hollidaysburg, Pa. Gray building used for Banking purposes and for keeping records of this Bank and all Branch Banks of Hollidaysburg Trust Co.

NAME OF OWNER, OCCUPANT OR POSSESSOR OF PREMISES TO BE SEARCHED (If proper name is unknown, give alias and/or description):

Hollidaysburg Trust Co.

VIOLATION OF (Describe conduct or specify statute): DATE OCCURRED:

Theft by Unlawful Taking or Disposition 3921-a — Aug. 15, 1990 to
Theft by Failure to Make Required Disposition of Funds Received 3927-a — Sept. 25, 1991
Receiving Stolen Property 3925 (F) (M) (M) CORE

PROBABLE CAUSE BELIEF IS BASED ON THE FOLLOWING FACTS AND CIRCUMSTANCES:

Your Affiant is a Police Officer with the Borough of Hollidaysburg and is Certified under Act # 120 as being a law enforcement officer for app. 22 yrs. Your Affiant has been over the past four weeks been investigating Irving PATZ and Andrew PATZ for taking money for their own personal use from Joe Kraemmen & Son Inc. 311 Wall St. Hollidaysburg, Pa. and have purchased Money Orders from the Hollidaysburg Trust Co. during the above time period to pay personal bills.

This officer has received information from Discover Card concerning a Money Order # 163517, issued by the Hollidaysburg Trust Co. on 7-25-91 to Andrew Patz in the amount of $ 800.00 and Money Orders # 157839 & 157110, amounts $ 276.40 and $ 56.40 issued by Hollidaysburg Trust Co. Further this officer has reason to believe several other money orders were purchased by either Irving Patz or Andrew Patz from the Hollidaysburg Trust Co. during the above time period.

ATTACH ADDITIONAL PAPER (S) COPIES IF NECESSARY ☐ CHECK HERE IF ADDITIONAL PAPER IS USED

RESULTS OF SEARCH: DATE AND TIME OF SEARCH 10-17-91 1154 ☒ A.M. ☐ P.M. | ARREST ☐ YES ☐ NO | JUDGE'S DISPOSITION ☐ DISC. ☐ HELD FOR COURT ☐ FURTHER HEARING ☐ FINED OR COMMITTED

(If "Yes" list information on seizure form 8705 and enter control number(s) here)

☐ YES ☐ NO

GIVE BRIEF UNNARRATIVE TO SHOW THE CIRCUMSTANCES UNDER WHICH THE SEARCH HAPPENED:

I have made the inventory to the best of my knowledge and belief a true and correct account of all items seized under this warrant.

SIGNATURE OF PERSON SEIZING PROPERTY — BADGE NO. — OTHER OFFICERS PARTICIPATING IN SEARCH: OFFICER THOMAS D. O'LEARY, NONE

Signature of Affiant — Address of Private Affiant — Badge No. — District/Unit

Sworn to and subscribed before me this 17th day of Oct 19 91. Office Address

Signature of Issuing Authority (SEAL) Mag. Dist. No. 24-3-02

13F

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8.

That said information surrounding MR. PATZ'S personal dealings were obtained from the Hollidaysburg Trust Account, without written authority or permission by the Defendant, IRVING PATZ.

9.

That the evidence/information received surrounding personal accounts of IRVING PATZ by Hollidaysburg Trust were either obtained without a search warrant, or in the alternative, were obtained with a warrant which no record is currently found in the District Magistrate's Office. Further, it is believed that if said warrant does exist, the probably cause surrounding said warrant is based on information and other documentation improperly and illegally received relative to MR. PATZ'S personal accounts from Hollidays-

burg Trust. Insofar as evidence surrounding personal accounts of MR. PATZ was obtained without his permission and/or without proper Court authority, its use at the time of trial is wholly improper and contrary to the provisions of the constitutions of both this Commonwealth and the United States.

WHEREFORE, Defendant respectfully prays and requests that this Honorable Court suppress all information obtained from the improper and illegal search and seizure of the briefcase found in MR. PATZ'S possession, as well as any and all documentation and information relative to MR. PATZ'S personal accounts received from Hollidaysburg Trust bank.

REPLY TO APPELLANTS' MOTION FOR RECONSIDERATION AND MOTION TO SHOW CAUSE

AND NOW, comes the Appellee, HOLLIDAYSBURG TRUST COMPANY, by and through its attorneys ANSTANDIG, LEVICOFF & McDYER, P.C., and files the within Reply to Appellants' Motion for Reconsideration and Motion to Show Cause as follows:

1. By Judgment Order dated January 25, 1994, this Court affirmed a District Court Order dismissing Appellants' claim.

2. In response thereto, Appellants filed a Motion for Reconsideration and Motion to Show Cause.

3. By letter dated February 9, 1994, this Court instructed Appellants that said Motion would be deemed a Petition for Rehearing and Motion for clarification of judgment.

5. Appellants requested that the

Court, "state a short opinion on the issue so as to allow the Appellants a reasonable determination of the law."

6. The issues which Appellants list in support of this request constitute matters briefed extensively both on appeal to this court as well as in the District Court including: an alleged violation of a non-existent constitutional right to privacy in bank records; alleged violations of state laws with respect to bank records and search warrant inventories; and, alleged state action on the part of a private banking corporation.

7. As pointed out by Appellants themselves, judgment may be entered by this Court without an opinion pursuant to F.R.A.P. 36.

8. Furthermore, this Court addressed the issue of the search warrant

inventory in an instructional manner, pursuant to the Order entered in response to Appellants' Motion for Mandatory Injunction, denying said request without prejudice to the right of Appellants to move before the criminal court in which the warrant was issued to request that an inventory be furnished.

9. The orders of this Court, the opinion below, and the briefs and pleadings filed in this claim provide more than a "reasonable determination of the law."

WHEREFORE, Appellee HOLLIDAYSBURG TRUST COMPANY respectfully requests that this Court deny Appellants' Motions.

ANSTANDIG, LEVICOFF & McDYER, P.C.

BY:_____
ATTORNEYS FOR APPELLEE,
HOLLIDAYSBURG TRUST COMPANY

Supreme Court, U.S.
FILED
JUL 7 1994
OFFICE OF THE CLERK

(2)

No. 93-2000

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

IRVING M. PATZ

and

ANDREW D. PATZ,

Petitioner,

V.

HOLLIDAYSBURG TRUST CO.,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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18 pp

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QUESTION PRESENTED FOR REVIEW

1. Whether Petitioners had any constitutionally protected privacy right or interest in negotiated bank money orders sufficient to form the basis of an action under 42 U.S.C. §1983.

2. Whether a bank's surrender of negotiated money orders to a police officer during a criminal investigation pursuant to a search warrant is an action by the bank under the color of state law sufficient to subject the bank to liability under 42 U.S.C. §1983.

3. Whether the District Court and Court of Appeals correctly dismissed Petitioner's pro se complaint pursuant to F.R.Civ.P.12(b) where it was held to be legally without merit?

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COUNTER-STATEMENT OF THE CASE

Petitioners filed this action in the United States District Court for the Western District of Pennsylvania, pro se, generally alleging that the Respondent, Hollidaysburg Trust Company,[1] somehow violated various "constitutional" rights by providing negotiated bank instruments to the police department pursuant to a search warrant. The local police department had sought the instruments in the course of their investigation concerning the theft of funds from Petitioner, Irving Patz's, employer.

Petitioners were eventually arrested and charged with theft. Prior to their criminal trial in the court of Common Pleas of Blair County, Pennsylvania, Petitioners filed a motion to suppress the evidence of money orders which had been provided to the police

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[1] Respondent, Hollidaysburg Trust Company, is a 100% owned subsidiary of Penn Central Bancorp., Inc.

by Hollidaysburg Trust Company pursuant to a search warrant. The motion to suppress was denied by the state trial criminal court. Following Petitioners' criminal trial, no appeal was taken by either Petitioner on the issue of the suppression of the bank records. Petitioner claims that his attorney at the criminal trial failed to brief the issue and lost the right to appeal that ruling.[2]

While Petitioner Irving Patz was incarcerated in a state prison in Mercer, Pennsylvania and Andrew Patz was living in Houston, Texas on probation, Petitioners filed this civil rights action against respondent, Hollidaysburg Trust Company, in an improper and misdirected attempt to collaterally chal-

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[2] It is interesting to note that, at the same time, Petitioners appear to claim that they were not convicted of any charges which arose out of the respondent's turning over records. Petitioner Irving Patz alleges he is incarcerated as a result of a conviction on unrelated charges. Petition for Writ of Certiorari, pp. 11-12.

lenge the state criminal trial court's decision in the suppression hearing.

Petitioners filed a pro se complaint and a motion to amend complaint, apparently attempting to plead a civil rights claim under 42 U.S. §1983. Petitioners generally alleged that respondent violated a "contractual duty of confidentiality", the 1st, 4th, 5th, 6th, 9th and 14th Amendments to the United States Constitution and the Pennsylvania Constitution, Article 1, Section 8, by providing Petitioners' negotiated money orders to the Hollidaysburg policy department.[3]

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[3] In their Petition for Writ of Certiorari, Petitioners claim only violations of their 4th, 5th, 9th, and 14th Amendment rights, although there is no discussion in the Petition as to the specifics of any of the alleged violations. Therefore, Petitioner has waived any claim under the 1st or 6th Amendments. Petitioners claims of violation of a "contractual duty of confidentiality" and the Pennsylvania constitution cannot be the basis of a §1983 action as they do not involve rights secured by the constitution or laws of the United States

Respondent filed a motion to dismiss in the District Court, on the basis that Petitioners failed to state a claim upon which relief could be granted, because there was no constitutionally protected right in negotiated instruments and that Respondent did not act under color of state law as required by 42 U.S.C. §1983.

The District Court, after consideration of both Petitioners' initial complaint and a motion to amend complaint, held that, even if Petitioners' conclusory allegations are accepted as true, there was no basis on which it could be held that respondent acted under color of state law, and therefore, the court lacked jurisdiction over the claim pursuant to 28 U.S.C. §1343(a)(3).

The Petitioners then appealed the District Court's decision to the United States Court of Appeals for the Third Circuit. The Court of Appeals for the Third Circuit affirmed the judgment of the District Court. Petitioners filed a motion to reconsider and

a motion for mandatory injunction which were both denied by the Court of Appeals for the Third Circuit. The Third circuit denied the Motion for Mandatory Injunction without prejudice to the right of the Petitioner to fie pleadings before the criminal court in which the search was conducted.

REASONS FOR DENYING THE PETITION

The Petitioners' civil rights action fails because it lacks both the elements required to bring an action under 42 U.S.C. §1983; (1) the infringement of a constitutionally protected interest, and (2) action under color of state law by a private person.

Additionally, appellant's pro se complaint and motion to amend complaint extensively set forth the basis of their claim. The courts below gave Petitioners the benefit of all inferences from the complaint and motion and considered all the evidence included within the complaint and motion to amend complaint. The courts below properly dis-

missed the action under F.R.Civ.P.12(b) as without legal merit, rather than due to technical deficiency.

Lastly, this action does not involve a question of general importance or a conflict on an important issue between the circuits which would merit review by this Court. This case was properly and fairly decided by the courts below and the Petition for Writ of Certiorari should be denied.

I. PETITIONERS' CLAIM LACKS THE REQUIRED ELEMENTS OF A 42 U.S.C. §1983 ACTION, AS THERE WAS NO DEPRIVATION OF A PROTECTED RIGHT AND NO "STATE ACTION" AND PETITIONERS' ACTION WAS PROPERLY DISMISSED.

This lawsuit is a misguided attempt to re-litigate or, in effect, "appeal" the state criminal trial court's ruling on the Petitioners' motion to suppress. Having failed to preserve the issue of the admissibility of the bank records for appeal in the state criminal court, Petitioners are now improperly attempting to re-litigate this issue in this action against a bystander to

the criminal trial, your Respondent, Hollidaysburg Trust Company.

The genesis of this action is that Hollidaysburg Trust Company provided negotiated money orders to the Hollidaysburg, Pennsylvania Police Department. This conduct cannot be the basis of a civil rights action pursuant to 42 U.S.C. §1983.

A §1983 action has two basic elements,

1. Plaintiff is bound to show that he has been deprived of a right "secured by the constitution and the laws of the Untied States".

2. Plaintiff must show that a private party deprived them of that right acting under color of any statute of a state. Flagg Brothers, Inc. v. Brooks, 436 U.S. 149, 98 S.Ct. 1729, 56 L.Ed.2d 185 (1978).

Petitioners' claim fails to satisfy either of these elements. This Court has previously held that there is no constitutional protection of bank records by virtue of the 4th Amendment. United Sates vs. Miller, 425 U.S. 435, 96 S.Ct. 1619, 48 L.Ed.2d 71 (1976). The Defendant in Miller argued that federal agents had violated his 4th Amendment

rights by seizing his banking and checking records. In rejecting the defendant's argument, the Court stated in relevant part:

> The checks are not confidential communications but negotiable instruments to be used in commercial transactions...The depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the government.
> 425 U.S. at 442-445.

In Miller, this Court expressly rejected any "expectation of privacy" in bank records which contain information voluntarily conveyed to banks, and held that the 4th Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Governmental authorities. 425 U.S. at 441-443.

Petitioners' citation of Commonwealth vs. DeJohn, 486 Pa. 32, 403 A.2d 1283, cert. den. DeJohn vs. Pennsylvania, 444 U.S. 1032, 100 S.Ct. 704, 62 L.Ed.2d 668 (1979), is a futile and improper attempt to create a conflict

between this Court and a state court of last resort concerning privacy rights in bank instruments. DeJohn was decided by the Pennsylvania Supreme Court solely on Pennsylvania state constitutional grounds.

Petitioners' claims also fail the second element required of a §1983 action. The lower court correctly held that respondent did not act "under color of state law" to deprive a Petitioner of any right. In fact, Petitioners expressly allege in their petition that Respondent acted in violation of, and not in accord with, state law. (See, Petition for Writ of Certiorari, Questions Presented, No. 2). This is inconsistent with a claim of action under color of state law, and is fatal to Petitioners' claims.

In Lugar v. Edmondson Oil Company, 457 U.S. 922, 102 S.Ct. 2744, 72 L.Ed.2d 482 (1982), cited by the District Court, a Petitioner brought a §1983 action against a creditor who had obtained a writ of attachment, sequestering Petitioner's property pursuant to

Virginia law. The Petitioner alleged that, in attaching his property, the creditor acted jointly with the state to deprive Petitioner of his property without due process of law. Id. at 924-925.

The Supreme Court held that insofar as Petitioner alleged only misuse or abuse by the respondents of Virginia law, he did not state a claim under §1983, but instead challenged only private action. This was so because the alleged conduct could not be ascribed to any governmental decisions; neither did respondents have the authority of state officials to put the weight of the state behind their decision. Id. at 940. In other words, to say that an act is "unlawful under state law" is to say that the conduct cannot be attributed to the state. Id.

Petitioners cite the decision of this Court in Adickes vs. S. H. Kress & Company, 398 U.S. 144, S.Ct. 1598, 26 L.Ed.2d 142 (1978) in an attempt to find state action. Adickes is clearly distinguishable from this

decision and does not conflict with either the Lugar decision or the Third circuit's decision in this case. Adickes involved a §1983 action alleging a conspiracy between a restaurant owner and the local police to deprive Ms. Adickes of her constitutional right to eat with black individuals in a public restaurant in Mississippi. Any attempt to analogize the facts of Adickes with those in the present matter must fail. The providing of bank records in which there is no constitutional protection cannot be equated with the refusal to serve persons based on their race in a public restaurant.

On the contrary, the lower court's decision is consistent with the decision of another circuit in a similar case. In Fonda vs. Gray, 707 F.2d 435 (9th Cir. 1983), the Court of Appeals for the Ninth Circuit held that a bank could not be liable under §1983 when the bank's actions were responsive to a request of the FBI to view Jane Fonda's bank records, as the state action requirement was

not met by the bank's mere compliance with a government official's request.

Finally, Petitioners claim they were held to some "higher standard of pleading" as pro se plaintiffs. On this issue, petitioners attempt to create a conflict between this case and Haines vs. Kearner, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972), which held that a prisoner could not be said to be unable to prove a set of facts in support of his claim that would entitle him to relief. The Petitioner in Haines alleged that he had been denied due process by being placed in solitary confinement as a disciplinary measure at a state prison.

In the contrast to Haines, the District Court and the Third Circuit gave Petitioners the benefit of every inference from their complaint and Motion to Amend Complaint, and did not base a judgment on any technical deficiency in the pleadings. Rather, the

claim lacked legal merit for the reasons stated above.[4]

CONCLUSION

Petitioners' Petition for Writ of Certiorari to the United States Supreme Court should be denied. The Petitioners' claims are entirely without merit and have no national or constitutional significance. The issues have been previously adjudicated and the rulings of the courts below are consistent with prior decisions of this Court and relevant decisions in the various Circuits.

Respectfully submitted,

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[4] Petitioners' 5th and 9th Amendment claims have not been briefed, are waived, and, at any rate, are baseless and completely unfounded, as the actions of a private party cannot serve as the basis of a claim under these amendments. Petitioners 14th Amendment claim necessarily fails as there is no state action.